FILED
JUL 1 1941
CHARLES ELMORE CROPLEY
CLERK

No. 227

IN THE

Supreme Court of the United States

TWIN PORTS OIL COMPANY, A CORPORATION,
Petitioner,

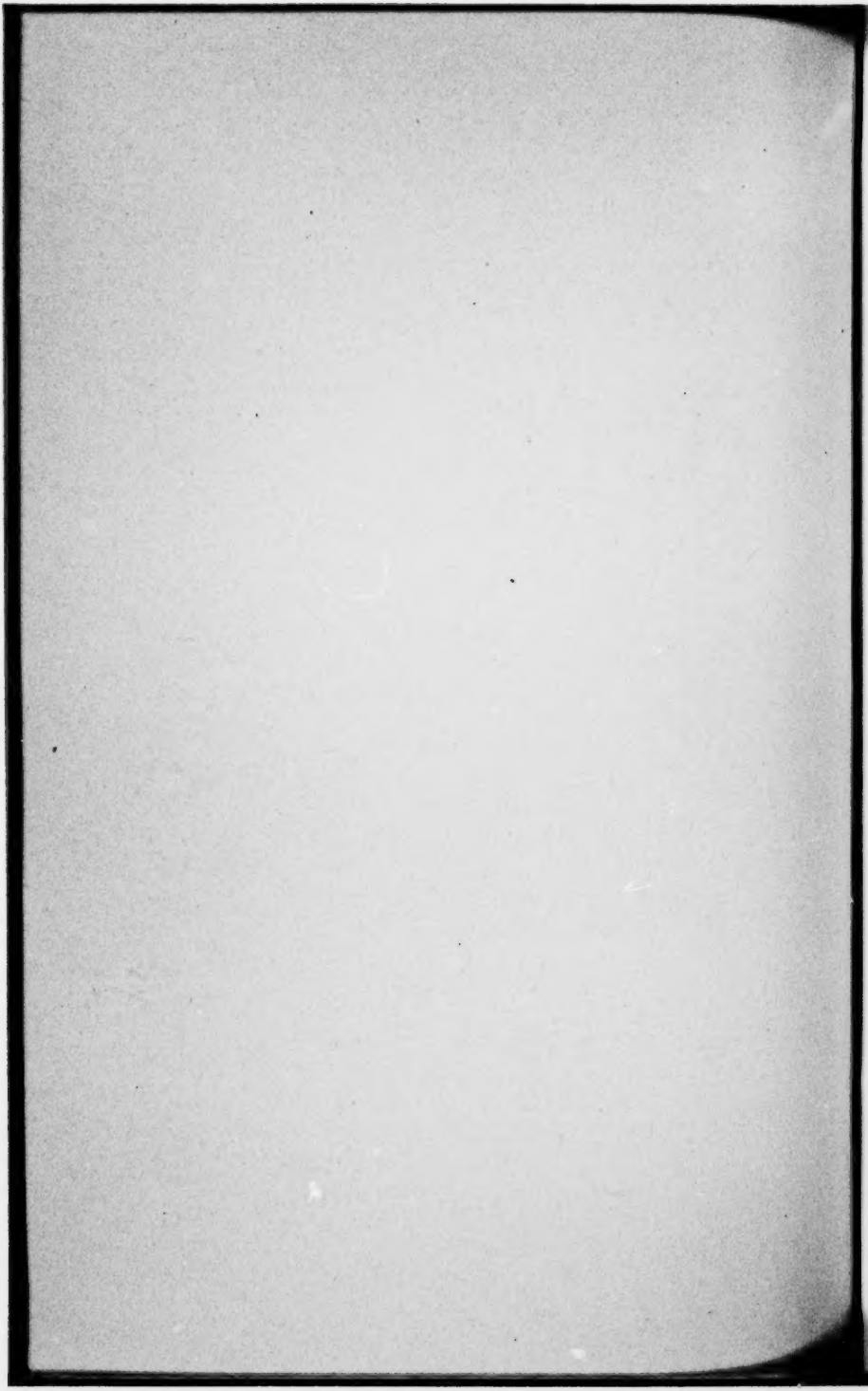
vs.

THE PURE OIL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

TOM DAVIS,
ERNEST A. MICHEL,
419 Metropolitan Bank Building,
JOHN P. DEVANEY,
414 Roanoke Building,
Minneapolis, Minnesota,
Attorneys for Petitioner.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis



INDEX.

	Page
Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit	1
Basis for Jurisdiction of This Court	4
Summary of Facts	5
Illegal Exaction	6
Conviction Not Disputed	6
Floor Placed Under Market	6
Jobber's Position Unique	7
What the Conspiracy Was: Buying Programs	7
Effect of the Buying Programs	8
Expert Testimony—Not Objected to—Undisputed	8
Use of the Word "Floor"	9
Testimony Undisputed	10
Petitioner's Theory	10
Directed Verdict: Lower Courts' Position	11
Petitioner's Position	12
Reasons Relied on for Allowance of Writ	12
Brief in Support of Petition for Writ of Certiorari	20
Precise Question Never Decided	20
Stop-Loss Provision	26
Liberal Rule as to Damages	28
Requiring Too Much of Plaintiff	29
Passed on to the Retailer	31
The Two Statutes Are Similar	35
Darnell Rule Not Based on Interstate Commerce Act	36
Rate of Overcharge in Case Not Involving Interstate Commerce Act But Sherman Act	37
Lower Courts at Variance With Supreme Court	40
Circuit Court Failed to Notice Cases	41
Pleadings, Stipulation, Margin	42
No Objection as Beyond Stipulation	43
A Technical Straw	43
Amendment of Pleadings	43
No Objection as to Pleadings or Stipulation	46
Conclusion	46

TABLE OF CASES CITED.

Page

Adams, et al., vs. Mills, et al., 286 U. S. 397, 76 L. Ed. 1184, 52 Sup. Ct. 589 ..... 3, 12, 13, 18, 19, 25, 33, 38, 41, 46
Balanbanoff vs. Kellogg, 118 Fed. (2d) 597 15
Chattanooga Foundry Co. vs. City of Atlanta, 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65 ..... 3, 4, 7, 10, 11, 13, 18, 20, 24, 25, 26, 27, 45
Cruikshank vs. St. Paul Fire & Marine, 75 Minn. 266, 77 N. W. 958 ..... 17, 41
Dimick vs. Schiedt, 293 U. S. 474, 70 L. Ed. 603, 55 S. Ct. 295 17
Erie Ry. vs. Tomkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 41
Eastman Kodak Co. vs. Southern Photo Material Co., 273 U. S. 365, 71 L. Ed. 684, 47 S. Ct. 400 ..... 16, 17, 28
Fyfe vs. Pan-Atlantic S. S. Corp., 114 Fed. (2d) 72 15
Hill vs. Northern Pacific Ry. Co., 297 N. W. 627 18
Holiday vs. Johnston, 61 Sup. Ct. 1015 ..... 15, 30, 41, 44, 46
Indiana Guide Publishing vs. Prairie Farmer Publishing, 293 U. S. 268, 79 L. Ed. 356, 55 S. Ct. 182 40
Johnson vs. Joseph Schlitz Brewing Co., 33 Fed. Supp. 176 18
Local 167 vs. United States, 291 U. S. 293, 78 L. Ed. 804, 54 S. Ct. 396 ..... 18, 31
Meeker vs. Lehigh Valley, 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328 14
Olds vs. Mapes-Reeve Construction Co., 177 Mass. 41-44, 58 N. E. 478 37
Olliphant vs. Fla. East Coast Car Ferry Co., 4 Fed. Supp. 288 37
Penn R. Co. vs. International Coal Min. Co., 230 U. S. 184, 57 L. Ed. 1446, 33 S. Ct. 893 14
Ramsay vs. Associated Billposters, 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167 ..... 16, 29, 30, 41
Rankin vs. Associated Billposters, 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167; also 42 Fed. (2d) 152, Cert. denied 282 U. S. 864, 75 L. Ed. 765 30
Southern Pacific Co. vs. Darnell Taenzer Lbr. Co., 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186 ..... 3, 12, 13, 18, 19, 24, 25, 26, 32, 33, 38, 41, 46
Stevens vs. Foster, 61 S. Ct. 210 ..... 15, 29, 41
Story Parchment vs. Paterson Parchment Paper Co., 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248 ..... 14, 16, 17, 27, 28, 29, 41
Straus vs. Victor Talking Machine Co., 297 Fed. 791 ..... 3, 7, 10, 13, 16, 18, 24, 27, 29, 45
Texas & Pacific Ry. Co. vs. Rigsby, 36 Sup. Ct. 482, 241 U. S. 33, 60 L. Ed. 874 ..... 16, 41
Thomsen vs. Cayser, 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353 ..... 3, 7, 10, 11, 13, 17, 18, 24, 37, 38, 41, 45
United States vs. Borden, et al., 308 U. S. 188, 84 L. Ed. 181, 60 S. Ct. 182 40
United States vs. Schecter, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 21
United States vs. Socony-Vacuum Oil, 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 ..... 1, 8, 9, 10, 18, 20, 21, 39, 41
Venuto vs. Robinson, 118 Fed. (2d) 680-683 15

STATUTES.

Sherman Anti-Trust Law, Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. Sec. 1, Mason's United States Statutes, Title 15, Sec. 15, as amended by the Act of October 15, 1914, c. 323, Sec. 4, 38 Stat. 731 ..... 4, 35
Interstate Commerce Act, Title 49, Section 8, Mason's United States Code, Title 49, U. S. C. A., Section 8 35
Rules of Civil Procedure:
Rule 8, Subdivision c-1, Sec. 1, f 15, 46
Rule 15, Subdivision b 15, 17, 46

IN THE

Supreme Court of the United States

TWIN PORTS OIL COMPANY, A CORPORATION,
Petitioner,

vs.

THE PURE OIL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Supreme Court of the United States:

Comes now the Twin Ports Oil Company and respectfully shows to this Court:

1. That the matter involved herein is the right of Petitioner to recover damages for injury to its business and property because of a violation by Respondent of the Sherman Anti-Trust Law. The violation consisted of a conspiracy to raise and fix prices of gasoline, of which conspiracy Respondent was duly convicted (*United States vs. Socony-Vacuum*, 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811). The conspiracy placed a "floor" under the market prices of gasoline, because of which an illegal exaction of 2¼¢ per gallon was made in the sale, under an exclusive franchise contract, of large quantities of gasoline by Respondent to Petitioner, this contributing to Petitioner's ruin and putting it out of business.

2. That Petitioner was an oil jobber at Duluth and was

purchasing gasoline from the Respondent under an exclusive contract, by which it could purchase and sell only the gasoline produced by Respondent, prices being determined by the averages of quoted sales appearing in certain trade publications, over which Petitioner had no control.

3. That while Petitioner was operating under such exclusive contract, Respondent, among others, criminally violated the Sherman Anti-Trust Law, in that it raised and fixed prices of gasoline and put a floor under the market prices of gasoline in the so-called Mid-Continent Field or Standard of Indiana territory. Because of the conspiracy, Petitioner could not purchase in a free and open market; it was forced to pay 2¼ cents more per gallon for one million seven hundred thousand (1,700,000) gallons of gasoline than it would otherwise have paid and as a proximate result of the conspiracy Petitioner was placed in such a situation that its property, of the undisputed value of $100,000.00 to $115,000.00 was lost. Respondent "took" (143) the property, giving Petitioner only $45,000.00 therefor. The property Respondent "took" (143) consisted of a bulk plant and nine filling stations (121), scores of gasoline station pumps, much equipment, and a going and profitable business in the city of Duluth, Minnesota, all wholly lost to Petitioner because of the conspiracy.

4. That in addition to the illegal exaction of 2¼¢ per gallon of gasoline sold to Petitioner and in addition to its property which Respondent "took" (143), Respondent also received, paying nothing therefor (159), the good will of Petitioner, built up as a jobber of gasoline in the city of Duluth, Minnesota, covering the years from 1921 to March, 1936.

5. That Petitioner was forced out of business because of the conspiracy herein and Respondent took over, and was up

to the time of the trial of this action, using and operating Petitioner's bulk station, filling stations, pumps, property and equipment, operating the same as a going business.

6. That upon the trial of this action in the District Court of Minnesota, a recovery for the illegal exaction of 2¼ cents per gallon, the loss of Petitioner's bulk plant, stations and equipment, and its good will was denied, and a verdict directed in favor of Respondent, on the ground that Petitioner had not suffered *any* damage because the illegal exaction "was passed on to the retailer" (254), which action of the District Court the Circuit Court of Appeals affirmed in an opinion handed down May 20, 1941 (334). Judgment was entered against said Petitioner on said 20th day of May, 1941 (344-345), and it is to review such judgment that this petition is presented.

7. That the case was tried under the illegal exaction rule enunciated in *Chattanooga Foundry Co. vs. City of Atlanta*, 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65; *Thomsen vs. Cayser*, 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, and *Straus vs. Victor Talking Machine Co.*, 297 Fed. 791. That the defense was that the illegal exaction was "passed on to the retailer" (254), a defense not allowable under *Southern Pacific vs. Darnell*, 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186, and *Adams vs. Mills*, 286 U. S. 397, 76 L. Ed. 1184, 52 S. Ct. 589, and that the opinion of the Circuit Court runs counter to all of the cases set forth in this paragraph.

8. That said judgment of the Circuit Court of Appeals is final; that the same is erroneous and that this Honorable Court should require this cause to be certified to it for review and determination, pursuant to law.

9. That by reason of the judgment of the Circuit Court of Appeals Petitioner, who has been injured in its business and property, has not received any compensation therefor,

and has been unwittingly deprived of its right to a trial by jury herein.

BASIS FOR JURISDICTION OF THIS COURT

That the judgment sought to be reviewed is that of the Circuit Court of Appeals for the Eighth Circuit herein, entered on the 20th day of May, 1941 (344-345).

That this Court has jurisdiction to review the judgment in question for the reason that this action is based upon the violation of the Sherman Anti-Trust Law, being the Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A., Sec. 1, *Mason's United States Statutes*, Title 15, Sec. 15, as amended by the Act of October 15, 1914, c. 323, Sec. 4, 38 Stat. 731, providing for recovery in civil actions, being as follows:

> "SUITS BY PERSONS INJURED: AMOUNT OF RECOVERY.—Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

It was not disputed in the courts below that the right of Petitioner to recover arose and was governed by the Sherman Anti-Trust Law.

Petitioner claimed a right of recovery because of the illegal exaction of 2¼ cents per gallon of gasoline it purchased, under the doctrine of this Court in *Chattanooga Foundry Co. vs. City of Atlanta, supra.*

Petitioner contended, in the language of the Chattanooga case, that it was "led to pay more than the worth of the pipe" (gasoline).

SUMMARY OF FACTS

The Twin Ports Oil Company was organized in 1921 by Axel Friedman, Milan Lubratovich and one Vercelline (117-118). These three gentlemen each put $5,000.00 into the oil jobbing company (139), they built up a substantial business. The money volume done by Petitioner until it was forced out of business was as follows:

Year		
1922	$153,000.00	
1923	236,000.00	(138)
1924	293,177.00	(139)
1925	323,562.00	(139)
1926	291,690.00	(139)
1927	291,931.00	(140)
1928	303,927.00	(140)
1929	338,447.00	(140)
1930	335,656.00	(140)
1931	308,833.00	(140)
1932	300,961.00	(140)
1933	252,589.00	(140)
1934	320,639.00	(141)
1935	326,365.00	(141)
1936 (3 mos.)	64,348.00	(141)

Upon this business gross profits were made (before deductions for bad debts, depreciation, etc.) ranging from $49,767.00 to $93,833.00 per year. Substantial net profits were made ranging from $5,692.00 in 1927 (140) to $27,362.00 in 1930 (140).

The evidence showed without dispute that Petitioner's bulk plant and its nine filling stations (121), pumps, and equipment had a value of $100,000.00 to $115,000.00 when Respondent "took" it (143). The trial court refused Petitioner permission to express an opinion as to the value of its good will (159).

When Petitioner was forced out of business, Respondent

allowed it $45,000.00 for its property, but it did not pay it in cash. It dribbled the payments out over a period of many months on the basis of 1¢ a gallon for the gasoline handled by the Respondent, with the equipment which it took away from Petitioner. Part of the $45,000.00 was paid by a cancellation of an indebtedness, part dribbled out as above (159).

During the period covered by Petitioner's claim, being the years 1935 and 1936 up to March 1, the Petitioner purchased of Respondent, under the exclusive contract, approximately 1,700,000 gallons of gasoline (127, 143).

This exclusive contract or franchise sales agreement provided that:

> "* * * the Buyer agrees to purchase from the Seller exclusively all the gasoline * * *" (264).
>
> "* * * the Buyer shall not at any time or under any circumstances whatsoever sell any gasoline, kerosene, lubricating oils or petroleum products other than those which Buyer purchases from the Seller" (264).
>
> "The price of * * * gasoline supplied under this agreement shall be the *average spot market price determined* by taking the *prices* for like materials *published* daily in Platt's Oilgram, Tulsa edition, and the Chicago Journal of Commerce" (265).

ILLEGAL EXACTION

Conviction Not Disputed. Floor Placed Under Market.

The judgment of conviction made *prima facie* evidence of the conspiracy by the provisions of the Sherman Act, was not disputed (112).

The uncontradicted evidence showed that by reason of the conspiracy a "floor" of 2¼¢ per gallon was placed under the tank car gasoline market in 1935 and 1936 (228-236).

By reason of this "floor" an unlawful exaction of 2¼¢ per

gallon was made by defendant on every gallon of gasoline purchased by plaintiff and plaintiff paid more than it otherwise would have. It sustained a damage on *this branch* of the case of 1,700,000 x 2¼¢ or $38,250.00.

Recovery for the illegal exaction was sought under *Chattanooga Foundry Co. vs. City of Atlanta; Thomsen vs. Cayser* and *Straus vs. Victor Talking Machine Co., supra.*

Jobber's Position Unique.

The jobber had nothing to say about the price he paid for gasoline; neither did he have anything to say about the price he sold it for. The price the jobber paid for gasoline was determined by the sales at Tulsa, as shown by the averages of the quotations as they appeared in the Chicago Journal of Commerce and Platt's Oilgram (265).

What the Conspiracy Was: Buying Programs.

Briefly, the conspiracy consisted of major oil companies getting together and buying up the gasoline of the independent companies.

The purpose of buying this gasoline was to keep it off the market and to "stabilize" prices.

In 1935 the major oil companies in the Mid-Continent Field bought from the so-called Independents from 600 to 900 cars of gasoline per month (227).

They bought up approximately 8,800 tank cars of gasoline from Independents in the East Texas Field in 1935 (227).

In 1935 and 1936 they purchased about 50% of all the gasoline manufactured by independent companies in the Mid-Continent and East Texas Fields (227-228).

Effect of the Buying Programs.

These buying programs had the effect of "stabilizing" or "holding up" gasoline prices, *making jobbers pay more* for their gas than they otherwise would have paid, according to the final judgment of guilt, interpreted and read in the light of the opinion in the criminal case, *United States vs. Socony-Vacuum*, 310 U. S. 150, 198, 84 L. Ed. 1129, 1155, 60 Sup. Ct. 811, 833.

Expert Testimony—Not Objected to—Undisputed.

After the general nature of the business was shown (108-111) and after it was shown that the plaintiff was a jobber, working under an exclusive contract with the Pure Oil Company (261), and after the final judgment of guilt of a conspiracy in violation of the Sherman Law was shown, plaintiff called the one main, pivotal and only witness it had and the only witness it relied upon, to *basically* show what *effect* the conspiracy had upon prices (221-228-236).

After a lengthy, full and complete qualification of Petitioner's expert witness, the following testimony was given:

"Q. Now, based upon this vast experience that you have detailed here, I will ask you if as an oil man you have an opinion as to the effect of the buying programs upon the tank car prices f.o.b. Group III, during 1935, from March until April, 1936? Have you such an opinion?

A. Yes.

Mr. Searls: That is the spot market price?

Mr. Michel: Yes.

Q. What is that opinion?

A. Well, my opinion is that *the buying program put a floor under the market,* the tank car market of 2¼¢ per gallon.

Q. During that period of 1935 to 1936?

A. Yes, sir" (228).

Use of the Word "Floor."

The word "floor" is used in the witness' testimony. This word is common to oil men and appeared much in Madison Case No. 1. Mr. Justice Douglas, in his opinion in *United States vs. Socony-Vacuum Oil Company,* 310 U. S. 150, 84 L. Ed. 1129, 60 Sup. Ct. 811, used this term. For instance, he said, "A 'floor' was placed and kept under the spot markets. Prices rose and jobbers and consumers in the Midwestern area paid more for their gasoline than they would have but for the conspiracy" (quotation 84 L. Ed. 1129, 1166, 310 U. S. 150, 220, 60 Sup. Ct. 811, 843).

Justice Douglas also spoke of the "placing of a floor under the spot markets," on the same pages above. He also spoke of the "maintenance of a 'floor' under the market."

While this term "floor" has a well known meaning with oil men, counsel for plaintiff re-called Mr. Cox to clarify and explain the meaning of the word "floor." We quote from the record:

> "By Mr. Michel:
>
> Q. Mr. Cox, this morning you used the term—which may be perfectly understandable to you in the oil business, but I don't know that it is to the Court and jury definitely—in answer to my question as to the effect of the buying program in 1935 and 1936 upon the tank car prices at Group III, you said it had the effect of *placing a floor* of 2¼ cents on it. Tell the jury what you mean by the word 'floor.'
>
> A. I mean that it would have been—the price would have been—the tank car market price would have been 2¼ cents *under* what it was.
>
> Mr. Michel: That is all" (236).

Petitioner purchased 1,700,000 gallons of gasoline, paying this illegal exaction of 2¼ cents per gallon therefor.

TESTIMONY UNDISPUTED

The facts as above given appear from the testimony *without objection* and *without dispute* (228-236). The fact of the conviction of Respondent of a violation of the Sherman Anti-Trust Law, which conviction was upheld by this Court (*United States vs. Socony-Vacuum,* 310 U. S. 150, 84 L. Ed. 1129) *was not disputed.* The testimony of John Cox that the effect of the buying programs was to place a *floor of* 2¼¢ *under the market was not disputed* (228-236).

PETITIONER'S THEORY

When the action was *first* started the question of *margins* was involved, but this question *was not in the case as it was tried.*

The Petitioner tried the case upon the theory of *Straus vs. Victor Talking Machine Co.,* 297 Fed. 791; *Thomsen vs. Cayser,* 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, and *Chattanooga Foundry Co. vs. City of Atlanta,* 203 U. S. 390, 51 L. Ed. 241, 27 Sup. Ct. 65, all Sherman Act cases. The general holding of these cases is that *plaintiff had a right to purchase goods in a free and uncontrolled market,* which if *invaded by the defendants* gave to plaintiff a right to recover the illegal exactions.

> "Plaintiff had the right to purchase Victor goods in a *free market.* This right was *invaded* by defendants, and plaintiffs were *forced to buy* in a *closed* market, *created* and *held* by the *illegal combination.*"
>
> *Straus vs. Victor Talking Machine Co., supra.*

> "The City * * * by reason of the *illegal arrangements* between the members of the trust" purchased "at a *price much above what was reasonable* or the pipe was worth. The purchase was made after a *simulated* competition at a price *fixed* by the trust."
>
> "The facts gave rise to a cause of action under the

Act of Congress. The City * * * was injured in its property * * * by being led to *pay more than the worth* of the pipe. * * * The *fact* that *defendants* and others had *combined with* the seller *led to* the *excessive* charge."

Chattanooga Foundry vs. City of Atlanta, 203 U. S. 390, 51 L. Ed. 241, 27 S. Ct. 65.

See also *Thomsen vs. Cayser, supra.*

DIRECTED VERDICT: LOWER COURTS' POSITION

The trial court *conceded the conspiracy and conceded that prices were illegally increased* (253), but, being of the opinion that the increase "*was passed on to the retailer*" (254) held that the Petitioner could not recover.

> "It is *uncontradicted* in the evidence that the *price* of gasoline to the *jobber* as a *result* of this *conspiracy* was *increased*, but it is also uncontradicted in the evidence that the retail price of gasoline assumed a corresponding increase, at least in so far as the Twin Ports Oil Company was concerned, and that any increase to the Twin Ports Oil Company in the price of gasoline *was passed on to the retailer*" (Statement Trial Court, 253-254).

This was one of the two most glaringly erroneous statements of the trial court. This statement was *not* quoted in the opinion of the Circuit Court of Appeals.

The trial court also erroneously held that damages had to be shown to a reasonable *certainty* under the Sherman Act (255).

The Circuit Court of Appeals agreed with the trial court that because the *illegal exaction was or could have been passed on to the retailer,* Petitioner could not recover (342).

Petitioner's Position.

Petitioner took the position as to this defense that, the conspiracy having been shown, and the "floor" or illegal exaction being proven, *without objection,* and appearing without contradiction, the law *did not go beyond the first step* and that what occurred *after* the *illegal exaction* was *of no consequence to the wrongdoer,* under the rule in *Southern Pac. vs. Darnell,* 245 U. S. 531, 62 L. Ed. 451, 38 S. Ct. 186, and *Adams vs. Mills,* 286 U. S. 397, 76 L. Ed. 1184, 52 S. Ct. 589. The Circuit Court *refused to follow* the rule in the Darnell and Adams Cases (342-343).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals for the Eighth Circuit decided an important question of Federal Law, to-wit: The right to recover damages because of a conceded violation of the Sherman Anti-Trust Law, arising out of the conviction of major oil companies in the so-called Madison cases. The decision is on an important question of Federal Law which has not been but should be settled by this Court.

2. The Circuit Court held that if the undisputed and undenied illegal exaction, due to the conspiracy, was or could have been "passed on to the retailer," that constituted a *defense* and Petitioner could not recover for the illegal exaction, which holding is contrary to the decisions of this Court in *Adams vs. Mills,* 286 U. S. 397, 76 L. Ed. 1184, 52 Sup. Ct. 589; *Southern Pac. vs. Darnell,* 245 U. S. 531, 62 L. Ed. 451, 38 Sup. Ct. 186.

3. The Circuit Court, while conceding that "passed on to the retailer" was *not* a defense under the Interstate Commerce Act, considered in *Southern Pacific vs. Darnell* and *Adams vs. Mills,* erroneously held that a *different and more*

restrictive rule of construction should be applied to the Sherman Anti-Trust Law than was applied to *similar* provisions of the Interstate Commerce Act, considered in *Adams vs. Mills* and *Southern Pacific vs. Darnell, supra.*

4. That a construction of the Sherman Act, as to when damages are allowable thereunder, is involved in this action.

5. The Circuit Court erred in failing to apply the rule announced by this Court in *Chattanooga Foundry Co. vs. City of Atlanta,* 203 U. S. 390, 51 L. Ed. 241, 27 Sup. Ct. 65, wherein this Court said that "where a combination of sellers caused prices of certain piping to a city *to be raised,* in violation of the Sherman Anti-Trust Law, the City could *recover the excess,*" and that the city was "injured in its business and property" by reason of the *unlawful increase* in the prices.

6. The Circuit Court judgment is contrary to the opinion of this Court in *Thomsen vs. Cayser,* 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, a rate case under the Sherman Act—*not* the Interstate Commerce Act, wherein this Court said:

> "The plaintiffs *alleged* a *charge over a reasonable rate* and the *amount* of it. If the charge be true that *more than a reasonable rate* was *secured* by the combination, the *excess* over what was reasonable *was an element of injury.*"

7. The opinion of the Circuit Court of Appeals is contrary to the decision of the Circuit Court of Appeals of the Second Circuit in *Straus vs. Victor Talking Machine Co.,* 297 Fed. 791, *supra,* a somewhat similar case.

8. The Circuit Court of Appeals erred in distinguishing between the Interstate Commerce Act and the Sherman Act and *Southern Pacific vs. Darnell* and *Adams vs. Mills* and the present case. It erred in holding that recoverable dam-

ages were permitted under the Interstate Commerce Act because under that Act they were *definite* and *specific* and the losses were fixed (343), but that the Sherman Act was *more restrictive* and required *more definite* proof, contrary to the decisions of the Supreme Court of the United States as follows:

> "The measure of damages was the *pecuniary loss* inflicted on the plaintiff as the result of the rebate paid. Those damages *might* be the *same* as the rebate, or *less than* the rebate, or *many times greater* than the rebate; but unless they were proved, they could not be recovered. *Whatever they were* they could be recovered."
>
> *Penn. R. Co. vs. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 S. Ct. 893.

> "There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss."
>
> *Meeker vs. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328,

The holding was also contrary to the rule as to *liberality as to damages* in *Story Parchment vs. Paterson Parchment Paper Co.*, 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248.

9. The Circuit Court was in error in its opinion as to *definiteness* as to damages under the Interstate Commerce Act, in that if definiteness be a requisite to recovery under the Sherman Act the testimony of John Cox as to the 2¼ cents illegal exaction provided *a basis* for the jury *to reach* a definite figure, and such figure, *if reached* by the jury, would constitute the *same* definiteness held existent by the Circuit Court of Appeals under the Interstate Commerce Act.

10. The Circuit Court of Appeals was unduly and im-

properly *technical and failed to give effect to the liberal rule of damages* in Sherman Act cases, laid down by this Court in *Story Parchment vs. Paterson Parchment Paper Co.*, 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248.

11. The Circuit Court of Appeals was *overly* and *unduly technical* and *violated the spirit of the New Rules of Procedure* in construing the pleadings and stipulation too technically, particularly in view of the fact that evidence of the conviction of the conspiracy (112-113-114) and the placing of a floor of 2¼ cents under the market was received without objection (228-236) (Rule 8, c. 1; Rule 15, b, Rules of Civil Procedure for the District Courts of the United States).

12. The Circuit Court of Appeals was in error in *failing to give effect to the evidence* as it appeared in the case, without dispute, and *to treat the pleadings*, if necessary, *as amended to conform to the evidence* under Rule 15, b, of the Rules of Civil Procedure for the District Courts of the United States.

13. The Circuit Court failed to give effect to Rule 8, f, "All pleadings shall be so construed as to do substantial justice," and to Rule 8, e, "No technical forms of pleading or motions are required," and failed to follow the *liberal trend* as to *pleadings* in cases under the Sherman Act, as appears from the decision of this Court in *Stevens vs. Foster*, 61 S. Ct. 210, and as appears in *Balanbanoff vs. Kellogg*, 118 Fed. (2d) 597, and *Fyfe vs. Pan-Atlantic S. S. Corp.*, 114 Fed. (2d) 72, and *Venuto vs. Robinson*, 118 Fed. (2d) 680-683, and *Holiday vs. Johnston*, 61 Sup. Ct. 1015, decided May 26, 1941.

14. The decision of the Circuit Court of Appeals, unless reversed, will weaken the Sherman Anti-Trust Law, for that the Circuit Court wholly failed to give effect to the opinion

and position of this Court as stated by Mr. Justice Pitney in *Texas & Pacific Ry. Co. vs. Rigsby,* 36 Sup. Ct. 482, 241 U. S. 33, 60 L. Ed. 874:

> "For the *consequences* that follow a *breach* of the *law* are *vital* and *integral* to its effect as a *regulation of conduct,* liability to *private suit* is or may be as *potent a deterrent* as liability to *public prosecution.*"

15. The Circuit Court failed to note the error of the District Court that damages "must appear by a reasonable certainty" (255), said statement of the trial court being erroneous under the rule stated in *Story Parchment vs. Paterson Parchment Paper Co.,* 282 U. S. 555, 75 L. Ed. 544, 51 S. Ct. 248.

16. The judgment of the Circuit Court places an undue burden upon plaintiffs in actions under the Sherman Act and requires plaintiffs "to prove perhaps more than was necessary."

Straus vs. Victor Talking Machine Co., 297 Fed. 791.

17. The Court failed to give effect to the fundamental purpose of the Sherman Act and its beneficent purpose, as announced by Mr. Justice McReynolds in *Ramsay vs. Associated Billposters,* 260 U. S. 501, 67 L. Ed. 368, 43 Sup. Ct. 167.

18. The Court failed to give effect to the liberal and basic rule as to damages in cases under the Sherman Act as laid down by this Court in *Eastman Kodak Company vs. Southern Photo Material Co.,* 273 U. S. 365, 71 L. Ed. 684, 47 S. Ct. 400.

19. The Court failed to consider the decisions of the Supreme Court of the United States in Sherman Anti-Trust Cases, failed to follow the trend of the decisions and failed

to give effect, generally, to the opinions of this Court in ten cases, which cases will be set out and hereafter referred to in Petitioner's Brief.

20. That in failing to apply the liberal rule of damages laid down by this Court in many cases, particularly the *Eastman Kodak Case*, 273 U. S. 365, 71 L. Ed. 684, and the *Story Parchment Case*, 282 U. S. 555, 75 L. Ed. 544, the Circuit Court left Petitioner "unshorn of justice"; uncompensated for the illegal exaction of 2¼ cents per gallon, permitted it to lose its property and business without just compensation and also unwittingly deprived Petitioner of its right to a trial by jury (*Dimick vs. Schiedt*, 293 U. S. 474, 79 L. Ed. 603, 55 Sup. Ct. 295). (Neither the Story Parchment Case nor the Eastman Kodak Case were mentioned by the Circuit Court in its opinion.)

21. The Circuit Court by its unduly technical construction of the pleadings and stipulation (actually not involved because Petitioner's evidence was received *without objection*, Rule 15, b, New Rules of Civil Procedure), has departed from the usual course of judicial proceedings and has failed to follow the usual liberality as to proof of damages in cases under the Sherman Act.

22. The Circuit Court of Appeals failed to mention in its opinion and to give effect to the case of *Cruikshank vs. St. Paul Fire & Marine*, 75 Minn. 266, 77 N. W. 958, and *Thomsen vs. Cayser*, 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, from each of which cases it appears that if *upon any theory* Petitioner might have a cause of action, judgment should not be granted against it.

23. The decision of the Circuit Court completely overturns the holdings of this Court that where there is an *original wrong* and an *illegal exaction* "the law does not go be-

yond *the first step" (Southern Pacific vs. Darnell* and *Adams vs. Mills, supra).*

24. The decision, in effect, coddles violators of the Anti-Trust Law and hems them about with safeguards to which they are not entitled because of their violation of the Country's laws. *Local 167 vs. United States,* 291 U. S. 293, 78 L. Ed. 804, 54 Sup. Ct. 396. *Johnson vs. Schlitz Brewing Co.,* 33 Fed. Supp. 176.

25. The trial court was in doubt in directing a verdict (255). The doubt was *resolved in favor of the law violator.* This was wrong *(Local 167 vs. United States, supra).* The error was followed by the Circuit Court and that, too, was wrong.

26. This Court in *United States vs. Socony-Vacuum,* 310 U. S. 150, 84 L. Ed. 1129, 60 S. Ct. 811, said that "There were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of *prices to jobbers* and consumers in the Mid-western area." And the indictment in Madison Case No. 1 charged that the major companies "*arbitrarily exacted large sums of money from thousands of jobbers.*" There is *no decision of this Court* construing the Sherman Act as to civil cases arising out of the judgment of conviction in the Madison price fixing case.

27. The Circuit Court failed to give effect to the Minnesota Rule as to testimony received without objection as enunciated in *Hill vs. Northern Pac. Ry. Co.,* 297 N. W. 627.

28. Many civil suits by jobbers are pending and if proof that the illegal exaction under the conspiracy does not give rise to a cause of action and the cases of *Chattanooga Foundry vs. City of Atlanta, Thomsen vs. Cayser,* and *Straus vs. Victor Talking Machine Co., supra,* are not to be followed

litigants and the Bar should be so advised. And the Bar should be advised as to whether the rule of this Court in *Adams vs. Mills* and *So. Pac. vs. Darnell* is to be followed or whether those cases are superseded by the opinion of the Circuit Court herein.

TOM DAVIS,
ERNEST A. MICHEL,
419 Metropolitan Bank Building,
414 Roanoke Building,
JOHN P. DEVANEY,
Minneapolis, Minnesota,
Attorneys for Petitioner.